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SUPREME COURT OF THE UNITED STATES.

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October Term, 1900.

Term No. 28.

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THE WISCONSIN, MINNESOTA & PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

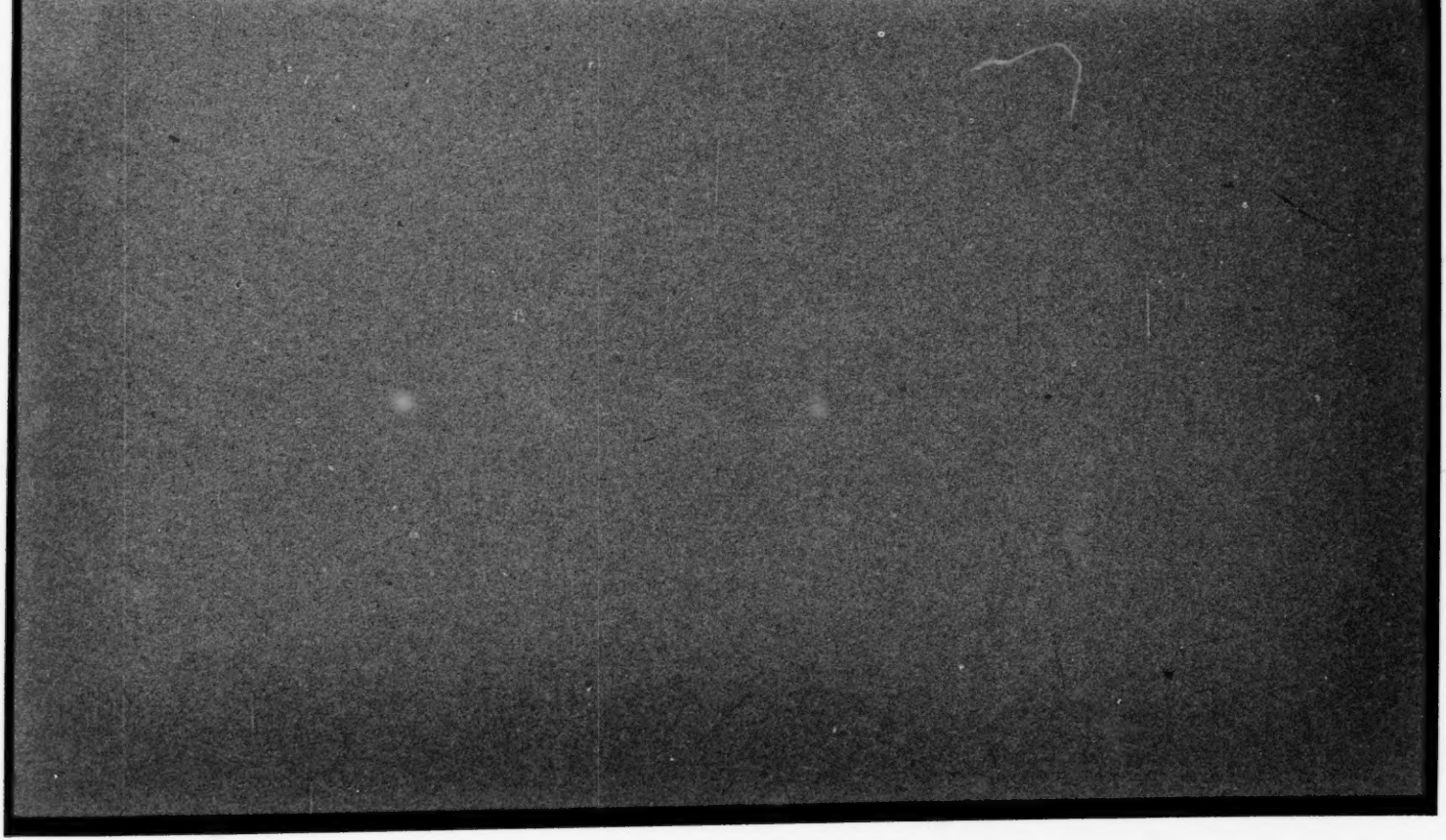
vs.

JACOB F. JACOBSON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

ALBERT H. CLARKE,
Attorney for Plaintiff in Error.



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THE WISCONSIN, MINNESOTA & PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

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ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

This case was submitted at the October, 1899, term. The submission was subsequently set aside, with a request for further argument. So far as I am advised, the Court has not suggested a limitation of the re-argument to any particu-
2 lar question; but has invited counsel to submit additional argument upon the whole case. There is, substantially, but a single issue. The case involves the constitutionality of Chapter 91 of the General Laws of Minnesota for 1895. For convenience in reference, and argument, the whole act is here reproduced. It reads as follows:

CHAPTER 91.

An act to amend chapter ten (10) of the General Laws of eighteen hundred and eighty-seven (1887), entitled an act to regulate common carriers, and creating the Railroad and Warehouse Commission of
3 the State of Minnesota and defining the duties of such commission in relation to common carriers.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That section three (3) of chapter ten (10) of the General Laws of eighteen hundred and eighty-seven (1887) be amended so as to read as follows:

SEC. 3. (A) That all common carriers subject to the provisions of this act shall provide at all points of connection, crossing or intersec-

tion at grade, where it is practicable and necessary for the interests
4 of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivery of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not
5 be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad and Warehouse Commission, and either party shall have the right to appeal from the order of said commission fixing the amount so to be
6 paid, to the district court of the county where said transfer facilities are furnished, by serving a notice in writing on the adverse party within ten (10) days after the making and filing of such order by said commission, and upon the service of such notice there shall be pending in said district court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of said transfer facilities. Pleadings shall be made and filed in said action in conformity to those required by law and rules of practice in said court, and said cause shall be
7 tried in the manner provided for the trial of civil actions in the district courts of this State.

(B) All railway companies doing business in this State shall, upon the demand of any person or persons interested, or upon demand of the Railroad and Warehouse Commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this State.

Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or
8 receiver of such carload lots, and such transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the Railroad and Warehouse Commission may prescribe, as hereafter provided in this act.

Less that carload lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this State are required to be carried
9 by two (2) or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road.

(C) In the event of that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, or fail to establish between themselves the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the
10 other and returned, or fail to provide for the convenient and prompt transfer of such through freight from the cars of the receiving company to those of the connecting line, it shall be the duty

of the Railroad and Warehouse Commission of this State, and said commission is hereby directed, upon the application of any person or persons interested, to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this State, and to prescribe the reasonable rules under which any such cars so transferred shall be returned; and in establishing, changing or revising any such rates they shall take into consideration the average of rates charged by said railway companies operating such connecting lines for joint interstate shipments for like distances.

The rates established by said commission shall go into effect within ten (10) days after the same are promulgated by said commission, and from and after that time the schedule of rates so established shall be prima facie evidence in all courts of this State that such rates are reasonable through rates for the transportation of freight and cars upon the railroads for which such schedule has been fixed.

(D) Before the promulgation of such rates or rules, as above provided, the Railroad and Warehouse Commission shall notify the companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of charges provided for in such schedule; and in the event of the failure of the railway companies to agree upon such division and to notify the Board of such agreement, said commission shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the commission shall, in all controversies or suits between the railroad companies interested, be prima facie evidence of the just and reasonable division of such charges.

(E) Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this State is hereby prohibited and declared to be unlawful, and every company or person violating the provisions of this section shall be subject to the penalties prescribed in section twelve (12) of the original act to which this act is amendatory.

(F) Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company when its own line of railroad runs to and reaches the point of destination or the point of connection with another railroad on which such point of destination is located, or to use its track or terminal facilities at terminal points for the handling of cars or traffic of another or competing company; *provided*, that in no case shall the charges for transportation exceed the established through joint rates between any two points.

(G) Whenever any property is received by any common carrier subject to the provisions of this act to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, the common law liability with reference to such property, while in its custody as a common carrier; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

SEC. 2. That subdivision "B" of section nine (9) of chapter ten (10) of the General Laws of one thousand eight hundred and eighty-seven (1887) is hereby amended by striking out all after the word "office" in line twelve (12) of said subdivision 'B," and substituting therefor the following, to-wit:

Said commissioners shall not, while holding office under this act, be interested in any stock or bonds of any common carrier or in any contract for construction, repair or maintenance of any railroad, or ac-

cept any retainer or employment from any common carrier under the jurisdiction of said commission.

17 No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

SEC. 3. That subdivision "D" of section fifteen (15) of chapter ten (10) of the General Laws of one thousand eight hundred and eighty-seven (1887), as amended by chapter one hundred and six (106) of the General Laws of one thousand eight hundred and ninety-one (1891), is hereby amended by inserting in line two (2) of said subdivision "D," after the word "commison," the words, "or any party to any proceeding before said commission and affected by its order."

18 SEC. 4. This act shall take effect and be in force from and after its passage.

Approved April 25th, 1895.

The act should be construed as an entirety; framed, as it is, with the evident purpose to invest the State Railroad and Warehouse Commission with authority to enforce performance in detail, and severally, of the several and successive acts requisite to the compulsory establishment of a traffic line made up of the railroads of two, or more, independent carriers, over which merchandise is to be transported under a

19 joint through tariff, to be fixed by the commission; which body is, by the act in question, invested with authority to apportion and divide joint earnings, under the tariff, between the carriers who are entitled to participate. The act goes even farther than this. The power thus conferred is not limited to the compulsory and arbitrary establishment of joint tariffs between railroads having tariff contracts and physical connections, by which performance of the order of the commission is made possible, but it assumes to authorize the commission to compel the construction of connecting tracks between all intersecting railroads, at any or all points of

20 intersection; to compel the transfer of freight; to oblige one carrier to deliver its rolling stock to the carrier with whose tracks such compulsory connection is made, and to transfer less than car load lots at actual cost. This case is one wherein the commission made its order for the construction of a connecting track. Another case, now before this court, for submission at the present term (The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. The State of Minnesota ex rel. The Railroad and Warehouse Commission, Term No. 381), involves the right of the commission, under the same act, to make and divide a through joint rate.

21 The two cases considered together, presents substantially all the questions which can arise under the provisions of the act, and furnish a test of its validity as an entirety. That the act is framed for one specific purpose, and that the construction and application of each sub-division involves the construction and application of the whole, seems reasonably certain. The chapter is simply a re-enactment and amendment of a single section of the original act creating the Railroad and Ware-

house Commission, and defining its duties. This section relates wholly to one subject; the compulsory connection of the tracks of different carriers and the establishment of a
22 joint line over the tracks of two or more carriers. The enforcement of track connection is a step preliminary and preparatory to the establishment of the joint through rate. Authority to make and enforce the joint tariff, is essential to afford results from the construction of the track; and I submit that the consideration of the provision authorizing the order to build the connecting track, brings the whole section, which constitutes the whole chapter, before the court.

The purpose and validity of a statute can be best determined by the possible results of its enforcement. That which manifestly *can* be done under its provisions, must be
23 taken to represent the purpose of its enactment. If that which can be done in pursuance of a law, is violative of a constitutional provision, the law itself must, perforce, be invalid.

We hold the law to be invalid for the following reasons:

It is violative of the Fourteenth Amendment to the Federal Constitution, in that it abridges the privileges and immunities of the plaintiff in error as a citizen; denies to it the equal protection of the laws, and deprives it of its property and the use thereof, without due compensation, or due process of law. It denies it the right of contracting with refer-
24 ence to its own business. It compels the plaintiff in error to enter into involuntary, unreasonable and unprofitable contracts with other carriers, the effect of which is to reduce the revenue of the plaintiff in error, deprive it of its business, lessen the earning capacity of its property and diminish the value of its investment. It violates the charter contract between the plaintiff in error and the State, and assumes to regulate interstate traffic and commerce.

That a railroad corporation is a citizen, has been many times decided; that it is possessed of the same property rights as the individual citizen seems to be conceded, theoretically, by the State courts, but denied when claim is made for
25 actual and practical recognition. The corporate citizen possesses, in common with the individual citizen, all rights guaranteed by the constitution. There should be, and can be rightfully, no dividing line between the constitutional rights of the corporation and the individual. They are alike, "persons" and "citizens." In the case of the corporation as well as that of the individual, the constitutional guarantee of personal right must be read "in the spirit of the Declaration of Independence," which, as was said by Mr. JUSTICE BREWER, "is the thought and spirit" of which the Constitution is the "body and letter." As the same learned Judge said in
26 *Railway Company vs. Ellis, 165 United States, page 154*, "the rights and securities guaranteed to persons by that

instrument, cannot be disregarded, in respect to those artificial entities called corporations, any more than they can be in respect to the individuals, who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations, the equal protection of the law than it has to individual citizens."

Nor has the State any greater, or different control over the property of the corporate citizen than it has over that of the individual.

The right of State regulation is not conferred by, or
27 dependent upon the question of corporate or individual ownership, but by the nature and character of the use. Whether property be owned by a corporation or an individual, is immaterial as regards the question of State control. In either case, the manner of its use is, without regard to the character of the property itself, subject to *reasonable* State regulation.

II.

The Act assumes to deprive the Plaintiff in Error of the control of its own property. The right of Control is one of its most valuable property rights.

Property has value in proportion to its productiveness. Productiveness is dependent, largely, if not wholly, upon control. The right of control, is the most valuable incident to the ownership of property. This statement is particularly true, as applied to income producing property. As applied to railroads, which are created, constructed and operated
28 with the sole purpose of producing revenue, the statement is axiomatic. To deprive a railroad company of the power to control its own property, to take away its right to select the carriers with which it will enter into traffic contracts; to deny to it the right to avail itself of the best bargain it can make in the way of division of joint earnings, where competition between connecting carriers makes it possible to contract to its own advantage; to arbitrarily fix a point at which it may be compelled to divert traffic, which it has originated, to the line of another carrier competing in the same territory for the same business, and thus deprive
29 the initial carrier of the long haul over its own rails (an advantage which it could secure, if permitted to make its own contracts), is to diminish, and in many cases destroy the value of the property. Railroads are operated upon business principles; and in order to operate them safely and remuneratively, their managers must have the same freedom to contract and to take advantage of business and commercial conditions, as that possessed by an individual in his personal and smaller business. The corporation is but the representative of individual interests and individual rights; and these rights, though united, are not extinguished by the consolidation. By the act of the Legislature of Min-

30 nesota, the State proposes to assume the control of the operation of the railroads within its borders, without assuming responsibility to the individuals whose property it destroys. Assuming the right and power to control and distribute corporate property for individual benefit, without cost to itself, the State declares its right to render the property of the plaintiff in error valueless and unproductive of revenue, by obliging it to exercise its corporate franchise in the construction of a track to be utilized for the surrender of its business to a competitor. Our railroad extends from St. Paul, westerly to Hanley Falls, a distance of 147 miles,
31 where it crosses the railroad of its co-defendant; thence, still westerly, 50 miles to the west line of the State. Shipments of stock originating on its line west of Hanley Falls are transported over its own railroad to St. Paul and Minneapolis, and there delivered to its connecting carriers. It is ordered, by the State, that this company shall buy or condemn land at Hanley Falls, not to improve, but to destroy its business, and build thereon a track connecting its railroad with that of a competing line; to the end that its stock business originating at points between Hanley Falls and the westerly State line (a total distance of 50 miles) may there be diverted from its
32 own railroad, thus depriving it of the long haul on all Sioux City and Omaha business. Compliance with the order of the commission would mean a material reduction of revenue. It reduces the haul of stock shipments from a possible 197 miles, to a possible fifty miles. By the enforcement of this order all competition is made impossible. Our business is taken away and turned over arbitrarily to another carrier. If either or both carriers decline to join in a traffic agreement, the commission may, under this act, establish an enforced partnership between them; make a joint through tariff; divide the earnings; compel an interchange of cars,
33 and, in brief, control and operate the railroad property. The effect of the exercise of this power is far reaching and disastrous. On one hand the carrier is called upon to furnish and maintain the complete transportation facilities which are demanded by present conditions. Those conditions call for skilled and expert labor, and the expensive and complicated instrumentalities indispensable to modern railway equipment. Unless these are supplied, the police power of the State is properly invoked to enforce their installation at the cost of the carrier. On the other hand, reduction of revenue, and diminished earning capacity, brought about by the establish-
34 ment and enforcement of non-compensatory tariffs, and diversion of traffic by arbitrary laws which destroy the value of corporate franchises, all done under the guise of State "regulation," necessitate reduced wages, employment of cheap labor and cripples an industry which furnishes employment to thousands of individual citizens.

"Liberty," declared by the Declaration of Independence to be the inalienable birthright of all men; guaranteed by the

constitution; for which the nation has sacrificed much blood and treasure, consists of something more material than a name. It is more than shadow; it is substance, and substantial. It confers upon the owner of property, purchased and paid for, something more tangible than theoretical and nominal ownership. It represents the right to possess; the right to use; the right to control; dominion; proprietorship. It represents the right to reap where one has sown; the right to
35 receive substantial profit from legitimate investment; the right to earn money by the use of property for the purpose for which it was designed and constructed; the right to secure and transact business; the right to the benefits of individual and corporate energy and enterprise. The guaranty of personal liberty is not met by a grant of the right to construct these great thoroughfares, in which there has been invested more than ten thousand millions of dollars, and the subsequent delegation to the political government of the State, of their control and management.

One effect of a physical connection between intersecting
36 railroads, at any given point, is to enable each to draw business from the territory of the other. In some cases the connection may be to the advantage of both; as it might furnish access to market, for certain products otherwise unmarketable, and result in increased production and additional revenue. In other cases the connection might build up the business of one carrier, and prove destructive to that of the other. This would be true where both companies were competitors for the same traffic to be transported over their respective roads to different destinations. In such cases the business of one is necessarily drawn from the other, and a
37 carrier, having constructed its railroad, should be permitted to exercise such control over its road and franchises, as will enable it to operate it to its own financial advantage. The co-defendant, The Willmar & Sioux Falls Railway Company, is a part of the Great Northern Railway. Track connection at Hanley Falls would make all stations upon our line tributary to its stock markets at Sioux City and Omaha, to the south, and its wheat markets at West Superior and Duluth to the north. Our railroad leads to the cities of Minneapolis and St. Paul, and our earnings are dependent upon transportation over our own railroad. To
38 reduce the volume of transportation and shorten the haul is destructive of our revenue, and ruinous. With the right to control our own property we can protect and preserve it. With the control placed in the hands of the Railroad and Warehouse Commission, its preservation is impossible.

The *control* of these great commercial highways, con-
39 structed by private capital, and by a combination of individual resources, is *property*. Deprivation of *control*, is deprivation of *property*. If this be effectuated by enforcement of a law which violates the constitution, it is not "due

process of law." An unconstitutional law is *void*. It is *no* law. It is a nullity.

Norton vs. Shelby County, 118, U. S. 425, 442.

Legislation of this class has already gone beyond the limit of safety. Legislators, selected from the body of the people,—unacquainted with constitutional limitations
40 upon State powers, not comprehending the dangers resulting from the disregard or invasion of the rights of property, have been led to enact laws, which, if enforced, will be destructive of personal rights and subversive of the Constitution. Under the guise of an exercise of the police power, necessarily vested in municipal governments, legislatures have, step by step, encroached upon personal rights.

Mr. JUSTICE BRADLEY said, in *Boyd vs. United States, 116 U. S., 616, 635:*

"Illigitimate and unconstitutional practices get their first footing by silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that
41 constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Railroad Commissioners have been, by statute, invested with plenary powers of control over the almost countless millions invested in American railroads. These administrative bodies, acting in good faith, and wrestling earnestly with the complicated and ever varying transportation problems
42 which have long puzzled the minds of the experienced and expert traffic managers of the continent, find no near approach to a solution of the problem of cheap transportation other than practical confiscation of property by destruction of its earning capacity. Several States have enacted laws identical in purpose, and nearly identical in language, with the act in question. In Nebraska, the Supreme Court of that State held such a law to be violative of the Federal Constitution and void.

State ex rel. etc., vs. Railroad Co., 46 Nebraska, 682.

43 Iowa, having first sustained a similiar act of its own legislature disaffirmed its approval in *Railway Co. vs. Dey, 56 Northwestern Rep., 271.*

It is not the purpose of the writer of this brief to question the right of the State to reasonably *regulate* railroad operation. Such right is conceded. It is the common law right

and duty of municipal governments to protect its citizens against extortionate and exhorbitant charges; to see that persons and property are transported at reasonable rates and with safety and dispatch. The proper management of railroads; the proper and safe operation of trains; the fur-
44 nishing of proper facilities to meet the necessities and reasonable convenience of the public are proper subjects of State regulation. But "regulation" is not "control." Step by step the right to "regulate" has been broadened by erroneous and unlawful construction until it has come to be assumed that regulation and control are synonymous. Every railroad carrier is invested with some rights which are as purely personal to the corporation, and as inviolate, as the personal rights of individual citizens. Quoting again, the language of MR. JUSTICE FIELD, in the *Santa Clara* case,

"The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are created by the State, so frequently and positively affirmed by counsel, has no
45 foundation whatever, in the law of the county. By the decision of the Supreme Court of the United States in the Dartmouth College case, it was settled, after great consideration, that the charter of a corporation, under which its franchises—its capacity to do business and hold property is conferred, is a contract between the corporators and the State, and therefore within the protection of the federal constitution prohibiting legislation impairing the obligation of contracts. So far from the State having unlimited control over the franchises
46 and property of corporations, because of its paternity to them, it has under that decision *only such as it possesses over the contracts and property of individuals.*"

Among the rights guaranteed to this plaintiff in error is the essential and fundamental right to control and manage its own property. Being a common carrier and a public servant, it may be compelled to receive and transport over its own line any merchandise tendered to it by either an individual or by a connecting carrier; but it cannot be compelled to enter into a general traffic arrangement with another carrier, for the establishment of a new joint line of transportation. A line of this character, voluntarily
47 established, becomes at once subject to reasonable State regulation; but compulsory establishment of a joint line is quite different from regulation of a line voluntarily established. If two individuals enter into a copartnership, such copartnership becomes at once subject to all general laws relating to partnership business. It will not be claimed that the *establishment* of a copartnership could be enforced by law. A corporation, doing business as a common carrier, may exercise the same control over its own property and business, as an individual. The fact that particular methods of
48 transacting its business might benefit certain of its patrons, furnishes no reason for investing the State with authority to compel it to adopt such methods.

III.

The Plaintiff in Error cannot be compelled to exercise its franchise beyond its own line.

The order of the commission not only requires the plaintiff in error to exercise its corporate franchise in the construction of an instrumentality to be used in the destruction of its own business, but calls for the purchase or condemnation of land outside its right of way, upon which to construct it. It is, perhaps, true that a railroad corporation can be
49 compelled to exercise the power of eminent domain in order to enable it to perform a duty which it owes to the public, in connection with the exercise of the franchise which the State has granted. But a railroad company cannot be *compelled* to exercise its franchise beyond its own line, or outside its own property.

Illinois ex rel. Hempstead vs. Railway Co., 55 Illinois, 95.

The connection is not, in any sense, necessary to the proper exercise of our franchise. The only reason that
50 can be urged for its enforced construction, is the fact that it will accommodate a few individuals in the vicinity of the point of intersection. Concede the fact to be as stated; does the acceptance of its franchise obligate a railroad company to construct tracks to afford the citizens of certain localities a shorter route to market than that which is afforded by its own located and constructed road? If so, to what extent can this obligation be extended? When required to build a track, not required for its own use, a single rail length outside its own property lines, thus admitting the obligation and
51 establishing the principle of the State control, where does the liability cease,and at what point is the obligation satisfied? If the same results, viz: individual accommodation, and more direct and convenient access to market, could be secured by the construction of a railroad to a point of connection with another railroad one mile distant, why cannot its construction be enforced? If one mile, why not ten miles? If this power and authority is vested in the State, why may it not compel all railroads to be united in one vast system operated under joint rates to be made and divided by the
52 Railroad and Warehouse Commission? If the plaintiff in error may be compelled to acquire an acre of land to be used to accomplish compulsory track connection, why may it not be compelled to acquire land for the same purpose to a greater extent? But the law is not satisfied by compliance with these requirements. It goes still farther in its assumption of State control over private property. It provides that,

"Car load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading

into other cars shall be done *without charge therefor* to the shipper or receiver of such car load lots. * * * Less than car load lots
53 shall be transferred into the connecting railway cars *at cost*, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act."

By this provision, the State assumes authority to control the movement and use of equipment. The initial carrier is required to turn its cars over to the connecting carrier at the point of intersection. The connecting carrier is, in turn, required to deliver the cars of the initial carrier to *its* succeeding carrier; for the law requires the transportation to be
54 continuous in the cars "in which such shipments were first made." If this law is constitutional and can be enforced in Minnesota, it may be enforced in all other States. To stop cars at State lines and there transfer their contents is admittedly impracticable. The enactment of similar statutes by other states would make it impossible for a railroad carrier to control or preserve its own rolling stock. A car would be but a link in an endless chain. Its owner would have no control over its movements and little knowledge as to its whereabouts or ultimate destination. Every carrier has the right to limit the use of its rolling stock to its own line. Its rolling
55 stock, in fact and in law, constitutes a part of its railroad. It cannot be obliged to deliver it to other carriers who may be wholly irresponsible, nor can it be mulcted in damages, equal to the cost of transferring shipments, as a penalty for refusing to lend or lease its cars to another carrier. Like other property owners, citizens of the United States, it has property rights for which it has the right to demand recognition and protection. Among these, is the right to *control its own property*.

Mr. Justice FIELD held, in *Oregon Short Line, etc., Co. vs. Northern Pacific R. R. Co., 51 Fed. Rep., 470*, that neither at common law nor under the Interstate Commerce Act can a railroad company be compelled to haul the cars of another
56 company over its line when it has cars of its own which it desires to use for the transportation of traffic; nor can one carrier be required to advance or assume payment of the freight charges due a preceding carrier. Such matters are regulated by contract.

It is held in *Railway Co. vs. Railway Co., 41 Fed. Rep., 562*, that a court cannot require a railroad company to contract with another carrier engaged in like traffic, for a joint through routing and joint through rate, nor can the court make such a contract for the parties.

And see:

57 *Railway Co. vs. Osborn, 52 Fed. Rep., 914.*
Railway Co. vs. Railway Co., 59 Fed. Rep., 400.
K. & I. Bridge Co. vs. Railway Co., 37 Fed. Rep., 625.

IV.

The act of the State Legislature deprives the Plaintiff in Error of the right to contract relative to its own business.

One of the most important incidents of railway operation is the making of judicious traffic contracts with other carriers. Rairoad corporations, like individuals, have the right to choose their own business associates. The responsibility of the
58 connecting carriers, their methods of doing business, the manner in which the joint earnings are divided, etc., are matters which figure prominently in traffic agreements. No law which presumes to compel a carrier to enter into involuntary contract relations with another, is valid. If two or more carriers by voluntary arrangement, create a joint line composed of parts, or all, of the railroads of the several carriers, the State may see that the rates charged for transportation over such joint line are reasonable. *It cannot determined how such joint earnings shall be divided between the carriers.* That is a matter of private right, with
59 which the State has no concern. If the shipper pays no more than a just and fair rate, it is immaterial to him, or to the public, how the earnings under such joint rate are divided. No legal excuse, or occasion, can arise for the exercise of the assumed power to enforce the making of a joint tarriff. The local rate of each carrier must be reasonable. This the State compels. Every carrier must accept merchandise tendered to it for carriage. This the law compels. The sum of two reasonable local rates cannot be unreasonable. The shipper can therefore have his goods transported at reasonable rates without a joint through rate. The carriers
60 *may* make a joint rate; they cannot be *compelled* to do so. They *may* make a joint through rate less than the sum of the reasonable local rates; they cannot be *compelled* to do so. They may *contract* to connect their tracks and create a joint line; they cannot be *compelled* to do so. Each, or either, may *contract* to accept and use the rolling stock of the other; each, or either, may *contract* to send its cars over the tracks of the other; but cannot be *compelled* to do so. These are all matters of private contract. The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot
61 be taken away.

The Fourteenth Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, neccessary and essential to his carrying out the purposes above mentioned. These rights are inalienable.

United States vs. Sweeney, 95 Fed. Rep. 450.
62 *Allgeyer vs. Louisiana, 165 U. S. 589.*

There are certain fundamental rights, possessed by every citizen, which are recognized in the organic law of every State. A statute which violates any of these rights is unconstitutional and void. The right to acquire and possess property includes the right to contract. This right was not created or conferred by the constitution. It is one of those fundamental rights, older than any written law, the existence of which is presupposed as the basis of political government. It is one of those existing and fundamental rights, the continuance of which is guaranteed by the constitution; not
63 created by it. The owner of property has a right to its independent enjoyment, subject only to the reasonable regulation necessary to prevent its use to the injury of others. This cannot be had, if he be deprived of the right to contract in relation to its use.

"The law of contracts," says Mr. Parsons, "may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts grow all rights, all duties, all obligations, and all law." The exercise of the right to contract enters into every transaction of business or social life, and cannot be
64 limited or controlled by legislation except where its exercise conflicts with public policy or is violative of law.

The effect of the statute under consideration is to deprive the plaintiff in error of the right, (1) to control its own business; (2) to make its own traffic contracts; (3) to select the carriers with whom it will enter into traffic agreements; (4) to determine whether or not it will join other carriers in the creation of joint lines; (5) to charge and collect its own reasonable local rate for the transportation of property over its own line, to the point of intersection with the road of a connecting carrier; (6) to determine and decide whether or not it will de-
65 liver its own rolling stock to a connecting carrier for use upon other railroads; (7) to select the connecting carrier to whom it will deliver goods committed to its care for transportation beyond its own line; by reason of which it is without security for the safety of the goods, or its own charges for transportation. The enforcement of this law leaves the carrier absolutely without any control over its own business. It is settled that one carrier cannot be compelled to advance the charges earned by the preceding connecting carrier. By the compulsory delivery of its cars, and their contents, to the intersecting line, as contemplated by this act, it loses con-
66 trol of its own cars, the goods transported, and the ability to collect its own earnings. Under this law it must accept the agency of the connecting carrier to collect its charges, or, if it demands payment in advance, it must assume to act as the collecting agent of such connecting carrier.

V.

The State has no power to establish contract relations between Carriers, by statute, and prosecute suits, in its own courts, to enforce their specific performance.

Another serious question involved, is as to the power of the State to compel the carrier to take *affirmative* action. The State, having granted to a body of individuals the franchise to be a corporation and the franchise to do certain
67 acts, may forfeit the franchises and withdraw the privileges if they are not exercised. If a railroad corporation fails to comply with the valid laws of the State, it may be subjected to lawful penalties and punishments, like any other citizen. If it is guilty of an affirmative act of wrong doing, it is liable to punishment. But this law contemplates a complete departure from the usual methods, and assumes the right of the State to compel railroad carriers to enter into involuntary contracts; or, to state it more correctly, to enter into relations with other carriers which can be voluntarily assumed by contract, only. The right of personal choice,
68 and the exercise of personal judgment is entirely taken away. The remedy is to *compel performance;* not punish non-performance. Liberty of action,—the exercise of personal discretion is not recognized or admitted. The law provides simply for *compulsory compliance*. The State says to the carrier—"Make a traffic agreement with the owner of every intersecting line; connect your railroad with every intersecting railroad; agree upon joint tariffs; agree upon a division of earnings; divert your traffic to other lines; lend or lease your rolling stock to other carriers; look to them to collect
69 your charges and to take charge of your patron's property,—and—if you decline to do these things the State will *compel* you to do them."

Courts of equity may compel the specific performance of contracts, but have never, so far as I can determine, conferred upon a State or court the power to *make* contracts between third parties, and then enforce specific performance. The right of a State to enforce the exercise of the power of eminent domain, or to compel the exercise of corporate franchises, has never been established. The case cited from 83 Missouri, page 144, involved only the exercise of the police
70 power; and is well distinguished by the following language of Mr. JUSTICE BREWER in *State vs. Railroad Company, 32 Federal Reporter, page 724.*

"So, I think, though without attempting to formulate a rule therein, a distinction will be drawn between cases in which the police power is invoked simply to regulate the use of property, and those in which a demand is made for the expenditure of money. It is one thing to require a railroad company to stop its trains at a given point; it is another to require it to go to the expense of building a depot at that point. One means nothing but the manner of use; the other calls for

an outlay of money. Much larger liberty will be accorded to the legislature in one direction than in the other. I do not mean to assert that the police power does not extend to any cases of the latter nature;
71 I simply affirm that the courts will put narrower boundaries upon an attempted exercise in this direction."

A reading of the syllabus in the case of the *Railway Company vs. the Railway Company, 109 Illinois, 135,* might lead the Court to believe that it was an authority in favor of the proposition that railroad companies can be compelled to haul the cars of other companies. Whatever is said upon that point, is pure dictum. The action was brought by one carrier against another, to recover for a car burned while in the custody of the defendant. The plaintiff corporation hauled a loaded car to the city of Peoria, and placed it upon a
72 transfer track. The defendant took possession of the car and hauled it to a distillery, where it was unloaded. When unloaded it was again taken by the defendant, without orders from the plaintiff, to a sugar refinery, to be reloaded and switched to the transfer track for shipment. On the same day the sugar refinery was burned; also the car. The question as to whether one carrier can be compelled to haul a car for another, was not involved. The defendant had taken the car at plaintiff's request, and it was burned while in the defendant's custody. The defendant was not a railroad carrier; it was a transfer company; its business was to receive
73 and transfer cars for other companies. As stated in the opinion on page 139, the Court says that: "*The proposition of law certified by the Appellate Court, when resolved, involves the single inquiry whether defendant, in the transaction out of which this action arose, bore to plaintiff the relation of common carrier, or was it that of a bailee or that of a warehouseman?*" The Court held that it was a common carrier. It voluntarily accepted the car at the request of the owner. It never refused to accept it. The question as to whether or not it could be compelled to receive it, was not involved. The only question was, that, having
74 voluntarily received it, in what capacity had it been received?

In the Massachusetts cases cited, the defendant railroad companies referred to were created by special charter with the usual reserved power in the Legislature to amend. The Legislature did amend, and the validity of the amendment was the question involved in the cases. The statute in question was one which provided that certain railroads, naming them, should so construct their tracks as to run into a Union Station to be established for the accommodation of the passenger tracks of the Boston & Albany Railroad Company and the four other railroads named. It was not a general law,
75 but was special legislation, applying to certain railroad companies designated by name. The Court held, that, under the reserved power of amendment, the act was properly

enacted. In the first case (109 Mass., p. 103), the Court says (p. 113): "At any rate the Legislature was the exclusive judge as to that matter, and an amendment of the several charters so as to secure such an object was a reasonable exercise of their reserved right. It is no valid objection to such amendments that they require corporations to extend their tracks and to exercise the right of eminent domain for this pur-
76 pose, and to incur additional expense."

This decision, therefore, goes upon the ground:

First. That the power to amend the special charter had been reserved by the Legislature.

Second. That such power of amendment had been exercised by the passage of the act under consideration.

To the same effect is the case in 113 Mass., p. 161. The distinction between the cases cited and the case at bar lies in the fact that there has been no attempt on the part of the Legislature to so amend the charters of the defendant
77 companies as to enable the Legislature to compel them to extend their tracks or build additional tracks. If the power to amend has been reserved, it has not been exercised. In the cases cited it was both reserved and exercised. The point there determined, is that when the Legislature has reserved the right to amend a charter, *and has amended* the charter, the amendment is valid.

The cases did not, so far as I have been able to learn, proceed beyond the State court. I do not think they can fairly be assumed to determine any question beyond the right of the State to exercise a reserved power of amendment, without
78 the consent of the railroad companies. The rule as to the question involved here, is, I submit, that laid down by the Illinois court, in the *Hempstead case* (*55 Ill., 95*), which holds that

"Railroad companies cannot be compelled, as common carriers, to receive goods at stations along their line for transportation, on the requirement of the consignor that they shall, themselves, deliver the goods at a point beyond or off their own line of road; or to deliver goods received by them for transportation, at such point. The
79 legal duty of the companies, in that regard, is commensurate only with their franchise; it is confined to their own line of road, and cannot be made to extend beyond it.

Nor can a railroad company, chartered with certain express powers and privileges, with certain termini within which they are to be exercised, be compelled to purchase, for the accommodation of the public, more extended privileges beyond the limits of their franchise, so that they may deliver goods at points not upon their line of their road, or within its established termini."

80 Enforcement of this law not only involves compulsory physical connection of the railways, and compulsory diversion of traffic, but, to be practical and beneficial, must include the compulsory making and installation of time schedules. Suppose the connecting company has no train passing the junction point into which the car of the initial

carrier can be received; suppose the connecting company has no cars at the place of junction into which the goods can be transferred; suppose the goods are perishable, and the weather is cold or otherwise unfavorable. If there are no cars into which to transfer the merchandise, must the initial carrier
81 side track its own cars, loaded with perishable goods, and permit them to stand upon a side track until such time as cars can be furnished for their reception, risking damage or destruction by frost, and the numerous other dangers to which such property is exposed in the course of transportation, or is it compelled to deliver its own cars, for which it has other use, to the other company? In many instances the expense of a transfer from the cars of one company to another would exceed the revenue received for transportation. The transfer would result in delay of trains, and every railroad company would either be compelled to keep a crew
82 of men at the point of intersection with every other railroad, with side track facilities and a warehouse for the purpose of handling and storing perishable property, or keep the train in which such cars were transported standing upon its line, to the delay of every other train, until its crew could transfer the contents of its cars to the cars of the other company. A practical enforcement of the law leads to innumerable absurdities. Its enforcement involves the confiscation of the property, labor, time and money of every railroad company whose tracks intersect the tracks of any other rail-
83 road company.

VI.

The statute under consideration is violative of the Charter Contract between the Plaintiff in Error and the State.

I doubt whether, upon this branch of the case, I can add anything, of interest, to the suggestions made in my former brief. I desire, however, to emphasize the proposition that the grant and acceptance of a charter *includes a contract* that the corporation organized pursuant to, or created by the charter act, may exercise all powers incident to its business.
84 The franchise to BE, is valueless without the franchise to DO. A franchise to operate a railroad is without value if it cannot be exercised. If a corporation may not retain and carry to destination the traffic which it has originated, and for the transportation of which it constructed its road, of what use is its franchise? If it may not control its own rolling stock, make its own traffic contracts, determine, for itself, whether or not it will unite with certain other carriers in the establishment of joint lines, the operation of which creates close business relations between the parties, make its own contracts for the division of joint earnings, and, in brief,
85 transact its own business, its franchise has no value. Because the free exercise of these powers are necessary to

the enjoyment of the franchise, I urge that they are incident to and are granted with the franchise; that a full and untrammelled right to their exercise is a part of the charter contract.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for the Plaintiff in Error.

DEFENDANT'S BRIEF

No. 199, 28

Br. & Douglas for D. C.

MAR 12 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT

Filed Mar. 12, 1900.

UNITED STATES.

OCTOBER TERM, 1899.

No. 199.

THE WISCONSIN, MINNESOTA & PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

JACOB F. JACOBSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF DEFENDANT IN ERROR.

W. P. [illegible], Attorney for [illegible],

Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

THE WISCONSIN, MINNESOTA & PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

JACOB F. JACOBSON,

Defendant in Error,

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This proceeding was commenced upon the petition of Jacob F. Jacobson, the defendant in error, made and presented to the Railroad and Warehouse Commission of the State of Minnesota, pursuant to chapter 91 of the General Laws of 1895, of which plaintiff in error had notice, and after a hearing upon said petition, at which evidence was introduced by the com-

plainant in support of said petition and by the defendant railroad companies in opposition thereto,

An order was made by the Commission dated June 19, 1896, and signed in behalf of said Commission by its secretary, A. K. Teisberg, directing that said petition be granted, and ordering the defendant railroad companies to forthwith provide at the place of intersection of their roads at Hanley Falls, Minnesota, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line or tracks of one of said companies to those of the other, and to forthwith provide at said place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering property and cars to and from their respective lines, and the order further described the mannner of making the track connections. From this order an appeal was taken to the district court for Yellow Medicine county, and the cause was tried *de novo* before Hon. Gorham Powers, district judge, who filed findings of fact and conclusions of law, which in substance affirmed said order of the Board of Railroad and Warehouse Commissioners, and are to be found on pages 57 to 62 of the record.

Whereupon judgment was entered in the district court of Yellow Medicine county on the 21st day of August, 1897, requiring the defendant in error and the

Willmar & Sioux Falls Railroad Company, impleaded with it, to forthwith provide at the place of intersection of the respective railroads at Hanley Falls, Minn., ample facilities, by track connections, for transfer of any and all cars used in the regular business of their respective lines of road from the tracks of one of said companies to those of the other, and also equal and reasonable facilities for the interchange of cars and traffic between the respective lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, and also requiring said companies to put in and construct for the purposes aforesaid at said place of intersection a track of the same gauge as the tracks of said companies.

From this judgment each of said companies appealed to the Supreme Court of Minnesota, and from the judgment of affirmance by the latter court (see Record, page 65) the pending writ of error was duly issued.

Upon the trial of the action in the district court evidence offered on behalf of the complainant, now the defendant in error, was received upon stipulation between the parties, and certain facts were also stipulated between all the parties to said proceedings, a complete statement of which may be found upon pages 55 and 56 of the record.

Recapitulating some material facts stipulated to upon said trial, upon which stress has not been placed, it appears that the Wisconsin, Minnesota & Pacific

Railroad Company, the defendant in error, owns a line of road upon which the village of Hanley Falls is situated, originating at Watertown, S. D., and extending from that point easterly and a little south, partially across the State of Minnesota, to Morton, where it connects with the Minneapolis & St. Louis road, which owns a line from Morton to Minneapolis. By virtue of a traffic and operating agreement through trains are run from Watertown to Minneapolis, although the ownership of the two lines aforesaid is distinct. The Willmar & Sioux Falls Railway Company is also a Minnesota corporation, and owns a line of railway running from Willmar, Minn., to Sioux Falls, S. D., intersecting the said railroad of the defendant in error at right angles at the station of Hanley Falls. The Willmar & Sioux Falls Railway Company is leased by and managed by the Great Northern Railroad Company, and, practically speaking, forms a part of the entire Great Northern system, connecting at Willmar with one of the main lines of the Great Northern, running from Minneapolis northwesterly across Minnesota, and ultimately to the Pacific coast.

Minneapolis is over one hundred miles east and a little north of Hanley Falls, and Sioux City, Iowa, is directly southwest. It is suggested by counsel of the plaintiff in error that the Minneapolis & St. Louis and the Great Northern Railway Companies are competitors for all business originating west of Hanley Falls destined not only to St. Paul and Minneapolis

to the northwest but to Omaha and Sioux City markets to the southwest, and attention is called to folio 101 of the record, in which it appears that the learned trial judge so found in the order of the court preceding entry of judgment. Attention is particularly called to the fact that the Minneapolis & St. Louis road, in this so-called competition for the Sioux City and Omaha markets, is compelled to freight its merchandise upwards of one hundred miles to the northeast, a like distance to the south, and a like distance to the west, to reach Sioux City, while from the station, Hanley Falls, on the direct route, the distance to Sioux City is approximately two hundred miles shorter.

The roads are not competitors between many other points, and upon final determination in the Minnesota courts, the Supreme Court found that "*there is nothing in the suggestion that the two appellants are competing roads within the terms of subdivision F of section 3 of said statute, at least so far as regards the traffic for which the connection in question is required.*" (Record, page 50, folio 122.)

The Railroad Commission and trial court found upon undisputed evidence, that a large amount of cattle were raised upon the line of railway of plaintiff in error west of Hanley Falls, which the owners desired to ship annually to the Sioux City, Iowa, market.

That traffic connection at Hanley Falls would operate to shorten the route 199 miles, and the time of

each trip about thirty-two hours. That an average saving in shrinkage and loss incident to cattle lying down from exhaustion and being killed upon each car approximate $25.00. (Record page 25, folio 45.)

It also appeared that certain lines of the Great Northern Railway connecting with the Willmar & Sioux Falls Railway Company pass through Northern Minnesota, which is densely wooded, and that with traffic connections at Hanley Falls thousands of cords of wood would annually be shipped via the Great Northern Railway to points in Minnesota west of Hanley Falls on the line of the plaintiffs in error at a saving to the residents of from $1.40 to $2.25 per cord. (Record, pages 26 to 30, folios 52 and 53.) That such timbered country is not tributary to the latter line of railway. (Record page 45, folio 46.)

In the opinion the Supreme Court based its decision, requiring a mechanical connection between the railroad companies in question at Hanley Falls, upon the necessity therefor arising from traffic in wood from stations in Minnesota along the line of the Willmar & Sioux Falls Railway. (Record page 67, folio 117.)

The Supreme Court expressly eliminates from the case all questions of interstate traffic. (Id.)

The crossing of the two railroads is at grade, and immediately adjacent to a regular station upon each of said lines of railway.

No evidence was offered by plaintiff in error (appellant) in the district court as to the want of

necessity for the making of this connection, but it rested its case wholly upon the evidence of the witnesses called in behalf of the petitioner upon this point. (Record, page 67, folio 117.)

Section 3 of chapter 91 of the laws of Minnesota for 1895 reads in part as follows:

"That section 3 of chapter 10 of the General Laws of 1887 be amended so as to read as follows:

"Sec. 3. (A.) That all common carriers subject to the provisions of this act shall provide at all points of connection, crossing or intersection at grade, where it is practicable and necessary for the interests of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivery of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad & Warehouse Commission, and either party shall have the right to appeal from the order of said commission fixing the amount so to be paid to the district court of the county where said transfer facilities are furnished. * * *

"(B.) All railway companies doing business in this state shall, upon the demand of any person or persons interested, or upon demand of the Railroad & Warehouse Commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this state.

"Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such car load lots, and such transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the Railroad & Warehouse Commission may prescribe as hereafter provided in this act.

"Less than car load lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by two (2) or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road."

Subdivision "C" authorizes the Railroad and Warehouse Commission of the State of Minnesota, in case said companies fail to establish reasonable joint rates for such through shipment of freight, or the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the other, and returned, or to provide for the convenient and prompt transfer of such through freight from cars of the receiving company to those of a connecting line, to establish reasonable joint rates for the shipment of freight and cars over

said lines, and to prescribe reasonable rules under which such cars so transferred shall be returned.

Section 13 of chapter 10 of the laws of 1887, which is amended by said chapter 91 of the laws of 1895, provides for notice to any common carrier of any complaint made under the provisions of said act, and the right to answer and be heard upon any proceeding contemplated before the decision therein is also granted, and the parties aggrieved are by said act given the right to appeal to the courts of the state from the decision of such commission.

By section 15 (b) (General Statutes 1894, section 393 B) of said chapter 10, the decision of the Board of Railroad and Warehouse Commissioners is made presumptive evidence on all appeals that the same is just and reasonable.

POINTS AND AUTHORITIES ON BEHALF OF DEFENDANT IN ERROR.

It is urged by the learned counsel for plaintiff in error that the Supreme Court of Minnesota—being the highest court of the state—erred in deciding (as applied to the issues before it), that Chapter 91 of the General Laws of Minnesota for the year 1895, amendatory of Chapter 10 of the General Laws of 1887, does not violate:

1. Section 8 of article 1 of the constitution of the United States which confers upon congress the ex-

clusive power to regulate commerce between states.

2. The fourteenth amendment to the Federal Constitution (a), by abridging the privileges and immunities of the plaintiff in error as a citizen; (b), by denying to it the equal protection of the laws; (c), by depriving it of its property and the use thereof without due compensation or due process of law; (d), by denying to it the right of contracting with reference to its own business, and thus taking its property without its consent, and compelling it to enter into involuntary, unreasonable and unprofitable contracts with another railroad company at the instance of third parties, resulting in a loss of business and revenue on the part of the plaintiff in error.

3. Section 10 of article 1 of the constitution of the United States by impairing the obligation of the charter contract between the state and the plaintiff in error.

The real question presented to this court is the validity of *that part* of Chapter 91 of the General Laws of 1895, authorizing courts to require a mechanical connection to be made between two non-competing railroad companies at a point immediately adjacent to the mutual stations upon such lines and which looks to future arrangements in the matter of traffic interchange between such lines of railway.

I.

The evidence will be deemed sufficient to sustain the order of the Railroad and Warehouse Commission, and the judgment of the court of last resort in Minnesota.

The statute expressly provides that the findings of the commission are *prima facie* just and reasonable. This is the policy of the act as to all investigations made by the commission.

G. S. 1894, secs. 381 (c), 392, 393 (b);

Steenerson vs. Great Northern Ry. Co., 69 Minn. 351.

An examination of the evidence adduced by plaintiff in error not only fails to overcome the order of the commission and the final judgment of the Supreme Court, but, on the other hand, sufficiently discloses both the practicability and commercial necessity of the facilities asked for in the complaint.

In the first place it is to be observed that the intersection of the lines is at right angles and in close proximity to the village and station of Hanley Falls. From the depot over the Wisconsin, Minnesota & Pacific Railroad, the plaintiff in error, it is but forty rods, while from the depot over the Willmar & Sioux Falls Railroad, it is about sixty or seventy rods. (Record, page 59, folio 103.) It is not, then, the case of the intersection of two lines of railroad at a distance from stations where it might be necessary to provide depots or freight houses, but within a few rods of the depots of both companies, where undoubt-

edly both roads are supplied with ample sidetracking where trains can be sidetracked if necessary.

The evidence fully demonstrates that shippers of stock and consumers of fuel residing west of Hanley Falls on the line of road of the plaintiff in error would be greatly benefited, while the cost of putting in the "Y" or mechanical connection, exclusive of the land, would be only about $1,200, the benefits to those patrons would amount annually to several thousand dollars.

Purposes of the Act.

The essential features of the act of 1895 are:

1. To require all common carriers to provide at all points of connection, crossing or intersection at grade where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross or intersect their own.

2. To provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivery of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith.

3. A common carrier is not required to furnish for another common carrier its track equipment or terminal facilities without reasonable compensation.

4. Each company owning the connecting lines is required to pays its proportionate share for the building and maintenance of tracks and switches as may be necessary to furnish the transfer facilities required by the act.

5. If the companies cannot agree as to the amount of such expenses which each is to pay or bear, the matter shall be adjusted by the Railroad and Warehouse Commission, with right of appeal to the district court.

With a view to the business to be transacted by aid of such facilities, the following provisions have been enacted in the same law, to the effect that:

1. Railway companies shall upon demand of any person or persons interested or of the Railroad and Warehouse Commission establish reasonable and joint through rates between points in this state.

2. Carload lots shall be transferred without unloading, unless done without expense to the shipper or receiver and shall be made without unreasonable delay. Less than carload lots shall be transferred into connecting railway cars at cost, which shall be included in and made part of the joint rates adopted by said railway companies. In each instance the charge is included in, and, as a whole, constitutes a reasonable rate.

3. If the common carriers fail for any reason to establish through joint rates or fail to establish between themselves the rates and terms upon which the cars of one company shall be transferred from

line to line, the Railroad and Warehouse Commission shall do it for them.

4. A company is not required to send its cars on another road when its own line of railroad runs to and reaches the point of destination of the shipment.

It will be observed that the judgment entered in this case barely directs the plaintiff in error and the Willmar & Sioux Falls Railway Company, originally impleaded with it, to provide a mechanical connection or "Y" at the point of intersection of said two lines of railway at the station Hanley Falls, and does not directly involve the details of establishing traffic connections, the amount of a joint rate, or the construction of the validity of that part of the Minnesota statute involving the amount of the charge for unloading cars at this point, or whether the amount of same must be deemed as injected into and forming a part of any joint rate to be mutually agreed upon or established in the future.

ARGUMENT.

I.

The assignments of error of the plaintiff in error will be considered in the order first above indicated.

Did the Supreme Court of Minnesota err in deciding, (as applied to the facts before it for consideration), that Chapter 91 of the General Laws of 1895 did not violate Section 8 of Article 1 of the Constitution of the United States, which confers upon Congress the exclusive power to regulate commerce between States and foreign Nations.

The learned Supreme Court of Minnesota in its decision herein, (Record, page 67, folios 116-117), uses the following language:

"Appellant W., M. & Pac. Ry. Co. contends that as the shipping of stock to Sioux City and Omaha is interstate commerce, the state tribunals have no jurisdiction over it and must not take into consideration the question of the transferring of cars of such stock when determining the necessity of a connection at this crossing. Conceding, without deciding, that the state tribunals would have no jurisdiction to require the making of this connection for the sole purpose of transferring cars engaged solely in the carrying of interstate commerce, it does not follow that these tribunals may not take into consideration the benefit of such commerce also when determining the necessity of this connection. The whole traffic to be benefited by the making of the connection may be amply sufficient to justify requiring the same to be made; yet the part of such traffic commencing and ending in the state may not be sufficient when taken alone, and the part which consists of interstate commerce may not be sufficient when taken alone. If appellant's position is correct, neither the state tribunals nor the Federal tribunals would have jurisdiction in such a case. Clearly such is not the law. In such a case jurisdiction is concurrent. If there is some necessity resulting from the benefit which will accrue to exclusively state commerce by reason of the putting in of the connection, this gives the state tribunals jurisdiction (Munn vs. Illinois, 94 U. S. 126), and in disposing of the case they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce.

"But even if this position was not correct, there is, in our opinion, ample evidence in this case of necessity resulting from the benefit which will accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question. We will go further."

It is urged: First—That any reasonable and necessary exercise of the police power by the legislature

of the state does not offend that clause of the constitution of the United States vesting in congress the sole power to regulate commerce between states.

Second—That public carriers assume public burdens. Their business is therefore affected with a public interest, and they are subject to reasonable exactions in the line of such duties imposed by the state creating them.

Minnesota vs. Gladson, 166 U. S. 430.

Hennington vs. Georgia, 163 U. S. 299.

Munn vs. Illinois, 94 U. S. 130.

Stones vs. Farmers Loan & Trust Co., 116 U. S. 334.

Georgia Banking Co. vs. Smith, 128 U. S. 179.

Osborn vs. Florida, 164 U. S. 650.

The attention of the court is called to a few excerpts from the opinions of the court in the above cases.

In *Gladson vs. Minnesota*, the court had under consideration the Minnesota statute requiring all passenger trains to stop at county seats in the respective counties. The train in question connected with the train of the same company running into another state and carried interstate passengers and United States mail. The court, at page 430, say:

"The principles of law which govern this case are familiar and have been often affirmed by this court. A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state

which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and *may make any other reasonable regulation for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public.* All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. Stone vs. Farmers' Loan and Trust Co., 116 U. S. 307, 333, 334; Smith vs. Alabama, 124 U. S. 465, 481, 482; Hennington vs. Georgia, 163 U. S. 299, 308, 317; New York, New Haven & Hartford Railroad vs. New York, 163 U. S. 628, 632."

In *Munn vs. Illinois*, at pages 125 and 130, the Court say:

"When, therefore, one devotes his property to a use in which the public has an interest he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control. * * * * *

"Common carriers exercise a sort of public office and have duties to perform in which the public is interested. New Jersey Nav. Co. vs. Mer. Bank, 6 How. 383. Their business is, therefore, 'affected with a public interest,' within the meaning of the doctrine which Lord Hale has so forcibly stated."

In *Hennington vs. Georgia*, the Court had under consideration a statute of Georgia, being section 4578, of the act of 1882, which prohibited, under penalty,

the running of any freight train upon any railroad in the state on Sunday. The superintendent of transportation of a certain railway was indicted and convicted of running a freight train over the said line of railway from Chattanooga, Tennessee, through Georgia into the State of Alabama, which train was loaded in Tennessee with freight consigned to points beyond the limits of Georgia. This court in affirming the decision of the Supreme Court of Georgia at pages 307-8 say:

"Assuming then, that both upon principle and authority the statute of Georgia is, in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people, we proceed to consider whether it is in conflict with the Constitution of the United States.

"The defendant contends that the running on the Sabbath day of railroad cars, laden with interstate freight, is committed exclusively to the control and supervision of the National Government; and that, although Congress has not taken any affirmative action upon the subject, state legislation interrupting, even for a limited time only, interstate commerce, whatever may be its object, and however essential such legislation may be for the comfort, peace and safety of the people of the state, is a regulation of interstate commerce forbidden by the Constitution of the United States. Is this view of the Constitution and of the relations between the states and the general government sustained by the former decisions of this court? Is the admitted general power of a state to provide by legislation for the health, the morals and the general welfare of its people so fettered that it may not enact any law whatever that relates to or affects in any degree the conduct of commerce among the states? If the people of a state deem it necessary to their peace, comfort and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on

within the limits of that state shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, is that result, so far as interstate freight traffic is concerned, attainable only through an affirmative act of congress giving its assent to such legislation?

"The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and, therefore, is valid, at least until congress interferes."

In *Georgia Banking Co. vs. Smith*, the Court had under consideration some of the reciprocal duties assumed by transportation companies as an incident to the special privileges conferred. At page 179 the Court say:

"So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn vs. Illinois, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression."

In *Stone vs. Farmers Loan & Trust Co.*, at page 334, the Court say:

"So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

In *Kidd vs. Pearson*, 128 U. S., at page 23, the Court say:

"As has been often said, 'legislation (by a state) may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution,' unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or interferes directly with its freedom. *Hall vs. De Cuir*, 95 U. S. 483."

In *Osborn vs. Florida*, the Court held (quoting from the syllabus) that:

"A license tax imposed upon express companies doing business in Florida as construed by the Supreme Court of that state, belongs solely to the business of the company within the state and does not apply to or affect the business which is interstate in its character, and if so construed, the statute does not, in any manner, violate the Federal Constitution. The construction of a state statute by the highest court of the state is not open to review."

The Supreme Court of Minnesota determining the case at bar in discussing the general question as to the necessity of providing a mechanical connection between the lines of railway of the plaintiff in error

and the line of the Willmar & Sioux Falls Railway Company, originally impleaded with it, and also the question of the right to enforce certain police regulations for the good of the general public, remotely affecting interstate commerce, use the following language:

"There is, in our opinion, ample evidence in this case of necessity resulting from the benefit which will accrue to *exclusively state commerce*, when considered alone, to justify the ordering of the connection in question." (Record page 67, folio 117.)

We submit that, independent of the contention that the statute in question is but a reasonable exercise of the police power of the state, which under the authorities cited, cannot be deemed to be a regulation of commerce between states within the meaning of the commerce clause of the Constitution, that the case at bar is brought directly within the principle decided by this court in *Osborn vs. Florida, supra,* and that the statute of Minnesota as construed by the highest court in the state, applied to the question before the court, must be deemed as not applying to or affecting business which is interstate in its character. The judgment of the lower court, which is assailed, barely directed the construction of a mechanical connection between these two lines of railway, and the courts of Minnesota held that the same was necessary as applied solely to traffic originating and ending in the state. We submit the determination of this question does not involve this clause of the Federal Constitution.

It would be greatly at variance with the modern doctrine upon the subject of public regulation of common carriers to say that the legislature is not authorized to require facilities in all cases contemplated by the statute under consideration.

We submit it is only upon the theory that the railway company is necessary to the general welfare of the public as an agency of travel and commerce that it is chartered, given the power of eminent domain and specially protected. The very nature of such business connects it with public interests and the relations of the public to railway companies of necessity must be reciprocal.

The view sometimes expressed that the police powers are restricted to questions of public health, public morals and public peace is too restricted, and does not accord with the weight of authority. It extends to all other subjects in the use, control, destruction and preservation of which the general welfare is involved.

Lawton vs. Steele 152 U. S. 133;
Thorpe vs. Rutland & B. R. R. Co., 27 Vt. 149;
Pac. Ex. Co. vs. Seibert, 142 U. S. 339;
Slaughter House Cases, 16 Wall. 36;
Beere vs. Massachusetts, 97 U. S. 25;
Boyd vs. Alabama, 94 U. S. 645;
Munn vs. Illinois, 94 U. S. 113;
Mo. Pac. Ry. Co. vs. Mackey, 127 U. S. 205;
Budd vs. People, 143 U. S. 517;
M. & St. L. Ry. Co. vs. Herrick, 127 U. S. 210;

State vs. Corbett, 57 Minn. 349;

Hawthorne vs. People, 109 Ill. 302;

State vs. Cargill Elevator Co. (Minn.), 79 N. W. R. 362;

Railroad Co. vs. Husen, 95 U. S. 465.

In *Lawton vs. Steele* the subject under consideration was a statute of New York regulating the taking of fish in certain waters of Lake Ontario, and providing for the destruction of certain fish nets. After enumerating many instances in which the police powers have been sustained relating to the public health, morals and peace, the court, speaking by Mr. Justice Brown, say:

"Beyond this, however, the state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

In this case the destruction of fish nets by a public officer pursuant to the authority conferred by the New York statutes was held, affirming the Court of Appeals of New York, to be the lawful exercise of the police power of the state, and that such destruction did not deprive the citizen of his property without due process of law and was not in violation of the provisions of the Constitution of the United States.

In *Thorpe vs. Rutland* it is said:

"Persons and property are subjected to all kinds of restrictions and burdens in order to secure the general comfort, health and prosperity of the state."

Cited with approval in *Slaughter House Cases, supra.*

In *Railroad Companies vs. Husen*, at page 474, the Court, referring to the police power, say:

"And as its range sometimes comes very near to the field committed by the Constitution to congress it is the duty of the courts to guard vigilantly against any needless intrusion."

II.

Does the statute in question abridge the privileges or immunities or deprive the plaintiff in error of its property without due process of law, or deny to it the equal protection of the laws?

In *Duncan vs. Missouri*, 152 U. S. 382, this Court, speaking by Mr. Justice Field, say:

"The privileges and immunities of the citizens of the United States protected by the 14th Amendment are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if and the laws operate on all alike and do not subject an individual to an arbitrary exercise if the powers of government."

It is not insisted that the plaintiff in error has been deprived of privileges or immunities arising out of the nature and essential character of the Federal government granted or secured by the Constitution. Neither is it suggested that the act of the legislature of Minnesota under consideration does not operate upon all alike. We submit, therefore, the only serious contention presented by the plaintiff in error which has not been foreclosed by the adjudications of this court is the assertion that the Minnesota

statute deprives it of its property without due process of law.

The narrow question presented, stated in another form, amounts to this: Does the decision of the court of last resort in Minnesota, made pursuant to the statute in question which requires the plaintiff in error to construct a mechanical connection between its line of railway and a non-competing line, with the ultimate view of requiring the interchange of cars or traffic between said two lines of railway, amount to a deprivation of the property of said plaintiff in error without due process of law, within the meaning of Section 1 of the 14th Amendment to the Federal Constitution?

That the 14th Amendment was not designed to and does not impair the police power of the State.

Barbier vs. Connolly, 113 U. S. 27.

In *Barbier vs. Connolly*, Mr. Justice Field, at page 31, while discussing many questions arising under the Amendment, speaking for the Court, used the following significant language:

"But neither the Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supply-

ing water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

It is submitted the design of the statute under consideration involves directly the public welfare of the people of Minnesota and does not inflict a serious burden upon the plaintiff in error, but rather a duty consistent with the ordinary methods of conducting its business, and concerning a subject with which the plaintiff in error is charged with a public interest.

That the legislature of the State has the power to compel a common carrier to do business in the ordinary and usual way, and therefore may compel such interchange of cars or transfer facilities as are incidental to the business for which the company was chartered.

Burlington, Etc., Ry. Co. vs. Day, 48 N. W. R. (Ia.) 98.

See, also,

Peoria, Etc., Ry. Co. vs. C., R. I. & P. Ry. Co., 109 Ill. 135;

Atchison Etc., Ry. Co. vs. Denver, Etc., Ry. Co., 110 U. S. 667;

Michigan Central Ry. Co. vs. Smithson, 45 Mich. 212;

State vs. Ry. Co., 83 Mo. 144;

Willmar & S. F. Ry. Co. vs. Jacobson. See Record, 69.

The learned counsel for plaintiff in error urges that the Supreme Court of Iowa in the same case upon a second appeal, disapproved this holding.

Burlington vs. Day, 56 N. W. R. 271.

A careful examination will show that the former ruling upon this particular point was not directly overthrown. No direct reference was made to the conclusion citicised, other than the statement that "some of us are content with the result reached in the former opinion, others, the writer included, do not approve of the reasoning and conclusions found in the opinion." The personnel of the court had changed during the period intervening, and the conclusion, at least is of force as indicating the judgment of the Supreme Court of Iowa as once constituted, which decision has not, as yet, been directly overthrown.

The authority also cited by the learned counsel on page 15 of his brief, to the effect that a like statute to the one under consideration was held by the Supreme Court of Nebraska to be in violation of the Federal Constitution, is clearly not in point.

State ex rel. vs. S. C., O. & W. R. Co., 65 N. W. R. 766.

In that case it appeared that the legislature of Nebraska, by Chapter 11 of the Laws of 1893, required railroad companies as an absolute finality, and without the right of judicial investigation by due process of law, to carry freight over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be.

The Court held, 1st: That this provision was in violation of the 14th Amendment to the Federal Constitution. 2nd. In the matter of the application before the board for an order to construct transfer switches, the Court at page 767, say:

"It is not possible to determine whether or not the connection by transfer switch could have been compelled under the provisions of Section 113, Chapter 16, Compiled Statutes (which was the act upon which the application was based), for there are contained in the application no averments showing the existence of prerequisites, indispensable under this section."

And the Court proceeded to decide, at page 771, that it does not follow that independently of legislative establishment of rates or requirements, *quasi* public corporations, "may by the Courts be compelled to enter into a particular agreement or assume particular relations, however just and equitable, toward each other. That subject has recently engaged the attention of the Supreme Court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be rather legislative than judicial in character,

notwithstanding the provisions of the interstate commerce act."

Citing *Atchison, T. & S. F. R. Co. vs. Denver & N. O. R. Co.* 110 U. S. 667, and other Cases.

It will be noticed the philosophy of the Nebraska case supports the contention of defendant in error here.

In *Peoria & P. U. Ry. Co. vs C., R. I. & P. Ry. Co., supra*, the Court, at pages 139, says:

"The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and reshipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads.

"The statute of this state that forbids 'extortion and unjust discrimination' by railroad companies, would seem by its provisions to recognize that railroad corporations may be common carriers of 'cars,' as well

as of freights, for such a corporation is not only forbidden to make any unjust discrimination in its charges for the transportation of passengers or freights, of any description, but for the use and 'transportation of any railroad car' upon its road. And why may there not be such a thing as a common carrier of cars, either with or without its load of freight? As to the freight the car contains, it will be conceded such carrying roads are common carriers, and are subject to the strict liability of such carriers, and, as has been seen, by a constitutional provision all the rolling stock and other movable property belonging to a railroad corporation in this State shall be considered personal property. What reason exists for discriminating against this class of 'personal property' and for holding that railway companies carrying it shall not be regarded as common carriers? The mode of moving it, whether on wheels or in carriages, ought not to be the foundation for any distinction. In either case the property is in the exclusive care and control of the carrier, and there is as much reason arising from public considerations why such a carrier should be held to the strict liability of an insurer for the safety of the property, in the one case as in the other. The facts in the present case show a strong necessity for imposing the liability attaching to a common carrier."

In *Atchison, T. & S. F. Ry. Co. vs. Denver & N. O., Ry. Co., supra*, at page 684, the court, speaking by Mr. Chief Justice Waite, say:

"Our attention has been called to several cases in the English courts where the question of reasonable or unreasonable preference by railway companies has been considered, but they all arose under the 'Railway and Canal Traffic Act, 1854,' 18 & 18 Vict., c. 31, and furnish but little aid in the determination of the present case. They are instructive and of high authority as to what would be undue or unreasonable preferences among competing customers, but none of them relate to the rights of connected railroads where there is no provision in law for their operation as continuous lines for business. And here it is proper to remark that in the very act under which these cases arose it is provided that 'every railway company

* * * working railways * * * which form part of a continuous line of railway * * * communication * * * shall afford all due and reasonable facilities for receiving and forwarding by one of such railways * * * all the traffic arriving by the other, without any unreasonable delay, and without any * * * preference or advantage, or prejudice or disadvantage, * * * and so that no obstruction may be offered to the public desirous of using such railways * * * as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways * * * of the several companies, be at all times afforded to the public in that behalf.' If complaint was made of a violation of this provision, application could be made to the courts for relief. Were there such a statute in Colorado, this case would come before us in a different aspect. *As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done, and what the proper legislative authority ought to do, for the relief of the parties to this controversy.*

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider. * * *

"The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy."

In *Michigan Central Ry. Co. vs. Smithson, supra*, the court, discussing the general subject, at page 221, by Mr. Justice Cooley, say:

"The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose, and which are upon wheels adapted to its gauge. It is compelled to do so—*First*, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, *second*, by its own interest. To attempt to stop every car offered to it at its own *termini*, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business, for which it must increase its charges to make up, if possible, for what it would lose. But *third*, the statute itself requires it. It is provided by General Laws, 1873, p. 99, that 'every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same merchandise and cars of any other corporation.' *The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish, could hardly fail to be speedy and effectual.*"

In *State, Etc., vs. The W., St. L. & P. Ry. Co., supra*, the Supreme Court of Missouri, in holding that the requirement of the legislature for the erection of such passenger waiting rooms at railroad crossings is a proper exercise of the police power of the State, by Mr. Justice Norton, at page 150, say:

"While the defendant company is a private corporation and the franchise and property acquired by it private property, the use to which it is applied is nevertheless a public use. The general assembly has delegated to railway companies the power to exercise the right of eminent domain, and to take private property upon which to construct their roads upon the sole ground that the property so taken is to be devoted to a public use, and that they were created and brought into being for public purposes; and it is upon this ground that the seizure of property for their use and the validity of county and municipal subscriptions to such enterprises have been maintained by the courts. Such being the designs of their creation, the public having an interest in the use have the right, through the legislature, to subject them to such reasonable regulations as will effectuate and promote the object of their creation. The requirement to build suitable depots or passenger houses at the crossing of railroads for the accommodation of the public desiring to avail themselves of the use to which the property of the corporation is devoted, and in which the public has an interest is not, in our opinion, an unreasonable regulation, and may be classed as coming within a proper exercise of the police power of the state, and directly in aid of the very object for which such corporations were created. Such a regulation neither disturbs any chartered rights nor impairs the obligation of any contract relation existing between the state and the corporation, but on the contrary was designed to facilitate public travel on roads respectively crossing each other."

The learned Supreme Court of Minnesota, adopting the philosophy of the above cases, held, that Chapter 91 of the Laws of Minnesota for 1895 was an exercise of the police power of the State, designed for the public welfare, and involving a public interest which the organization of the plaintiff railroad was designed to promote.

A somewhat similar question arose in the *Express Cases*, 117 U. S. 1.

Certain Express Companies sought to compel railroad companies to give them the express facilities which they had previously enjoyed under contracts which had been terminated by notice. The Express Companies relied upon their common law right to be accommodated as a part of the public by common carriers. The majority opinion of the court was against this. At page 29 the court say:

"The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the State, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage or by contract or by statute, the courts cannot be called on to give it effect."

Mr. Justice Field, being joined by Mr. Justice Miller in dissenting, said:

"But I am clear that railroad companies are bound as common carriers to accommodate the public in the transportation of goods according to its necessities, an through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities, express companies, by the mode in which their business is conducted, are the most important and useful."

In this connection attention is called to the fact that the courts of Minnesota have held that the necessity exists and the public welfare demands that the mechanical connection ordered to be constructed by the plaintiff in error and its co-defendant in the original proceedings, shall be made.

The position above outlined of the plaintiff in error finds further support in *Mayor & Alderman vs. N. W. Ry. Co.*, 109 Mass. 112, wherein the Court decreed, pursuant to legislative authority, the extension of the line of tracks of a certain railroad having a terminus in the City of Worcester. The Court say:

"At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters, so as to secure such an object, was a reasonable exercise of their reserved right. It is no valid objection to such amendments, that they require corporations to extend their tracks, and to exercise the right of eminent domain for this purpose and to incur additional expense. The power to extend their tracks is often granted at their own request; and is granted with no less propriety when the interests of the public require it. The power to alter a charter includes the right to take away some of the powers granted by it, or to add new powers without which improvements of the greatest importance would be *ultra vires*. Their compensation for the outlay is in the tolls they receive from travelers or others.

"It is contended that if this act is sustained it will imply a power in the legislature to require a railroad corporation to extend its track to the state line in any direction. This is putting an extreme case; but we have no occasion to consider such a case, for all the roads named in the act and required to extend their tracks have a terminus in the city of Worcester, and are to be extended only through a portion of the city to the station of the Boston & Albany Railroad. The power to require a track to be lengthened certainly exists to this extent if it exists at all."

I may be pardoned for referring to the oft quoted language of the Court in Munn vs. Illinois, that

"Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large; when, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants the pub-

lic interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

If a railroad company can be required to construct a depot for the accommodation of passengers, a platform for the receipt of freight at stations or extend its tracks when the necessities of the public require it, why can it not be compelled by statute to provide a "Y" or mechanical connection for the receipt of freight consigned over the tracks of a company intersecting its line?

The learned counsel calls particular attention to that clause in the statute requiring railroads to unload freight in car lots free of cost, in cases of refusal of such companies to provide transportation facilities for the interchange of cars. It is submitted that the true construction of the statute as a whole contemplates the establishment of a reasonable joint and through rate, which of necessity implies a reasonable charge for all services rendered. Defendant in error in his evidence given in the original case (Record page 45, folio 76) concedes this construction, and the state does not and will never contend for any other interpretation of the statute. That question was not directly before the Court at any stage in this proceeding for the purpose of determination. (See Opinion, Record pages 69-70, folio 121.)

Counsel for plaintiff in error maintains on page 14 of his brief that neither at common law nor under the interstate commerce act can a railroad company be compelled to haul the cars of another company over its line where it has cars of its own which it desires to use for the transportation of traffic, and cites,

Oregon Short Line Co. vs. N. P. R. R. Co., 51 Fed. Rep. 470;

Little Rock & M. R. Co. vs. St. Louis & I. M. S. Co., 41 Fed. 562;

Railway Co. vs. Osborn, 52 Fed. 914;

Railway Company vs. Railway Company, 59 Fed. 400;

Kentucky & I. Bridge Co. vs. Louisville, 375 Fed. 625.

In each of the above cases the decision is based upon the ground that the legislative authority imposing this duty or obligation is wanting.

In *Kentucky & I. Bridge Co. vs. Louisville*, referring to the interstate commerce act, the learned judge says:

"Neither this act nor any other provision of the law requires of the common carrier of interstate commerce the duty of either forming new connections or establishing new stations for the reception and delivery of freight. The act deals with common carriers as it finds them, and leaves them full discretion as to what connections they may form."

In *Railway Co. vs. Osborn* the learned trial judge says:

"No power existed at common law and none is given by the act to the court or commission, to compel connecting companies to contract with each other; to abandon separate control of their separate rights, or to unite in a joint tariff."

Citing with approval the language of the Court in *Express Cases*, 117 U. S. 1; *Kentucky & I. B. Co. vs. Louisville, supra; Little Rock & M. R. Co. vs. St. Louis & I. M. S. Co.*, supra.

Railway Co. vs. Railway Company, 59 Fed. 400, is to the same effect.

It, therefore, follows that each authority cited by the learned counsel tells for the defendant in error.

III.

Does the act under consideration impair the obligation of the charter contract between the State of Minnesota and the plaintiff in error?

The plaintiff in error was organized as a corporation by an act of the Territory of Minnesota at the Extra Session of 1857, Chapter 2, Section 3, which includes the grant of power set forth in full at page 11 of the brief filed in its behalf. The utmost that can be said of this grant is that it organized the plaintiff in error as a corporation and authorized it to construct a line of railway with the usual powers of railway companies. Exemption from future general legislation was neither expressly given in said charter or granted by implication in the most remote degree.

The question seems to be settled in this court that exemptions from future general legislation, either by constitutional provision or by an act of the legislature, does not exist, unless it is expressly given in private

charters, or unless it follows by an implication equally as clear as if expressed in the plainest phraseology.

Pennsylvania Ry. Co. vs. Miller, 132 U. S. 75, and cases cited;

Pierce on Railroads, page 457;

C. & C. Ry. Co. vs. Minnesota, 134 U. S. 455.

It is urged that the doctrine of *Planters' Bank vs. Sharp*, 6 How. 327, invoked by counsel, has no application whatever.

In *State ex rel. City of St. Paul vs. St. Paul City Ry. Co.*, 81 N. W. Rep. 200, the Court say:

"While the municipality cannot impair the obligation of its contract under the guise of exercising its police power, yet it cannot surrender or barter away its police power under the guise of making a contract."

That the same rule applies to a State see

Douglas vs. Kentucky, 168 U. S. 488.

In the former case the Minnesota court had before it, and affirmed, the right of the City of St. Paul to require the City Railway Company to lay its tracks in other streets than those named in its original charter contract; while in the latter the celebrated Louisiana Lottery charter was under consideration.

IV.

Attention is particularly called to the fact that the lessee of the plaintiff in error has traffic connections with the Great Northern Railway Company, the lessee of the Willmar & Sioux Falls Railway Company, one of the original defendants in this proceeding, at a point not affected by the traffic tributary to Han-

ley Falls, to-wit, at Minneapolis (Record page 56, folio 97).

This fact bears sharply upon the force of the contention of the learned counsel for plaintiff in error that the statute under consideration may drive them into traffic relations at Hanley Falls dangerous to the company. If traffic relations are maintained with the Great Northern at Minneapolis, it can fairly be inferred the same companies may, with safety, enter into like relations at other points. It is contended that the courts will take judicial notice of the ordinary and necessary methods employed by railroads in handling the commerce of the country. Also that the legislatures of the various states have power to provide (as applied to its local interests) for the adoption and execution of such methods where the public necessity or welfare requires it.

In conclusion defendant in error submits that the act of the legislature of Minnesota places no burden upon, but is rather in aid of, commerce between States; that it does not deprive the plaintiff in error of any rights secured by the Fourteenth Amendment to the Federal Constitution; and that by said act the State of Minnesota has not offended the contract organizing said corporation made while a Territory.

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